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7 **UNITED STATES DISTRICT COURT**
8 **WESTERN DISTRICT OF WASHINGTON**

9 SANDRA HERRERA, et al.,

10 Plaintiffs,

11 vs.

12 PIERCE COUNTY, et al.,

13 Defendants.

Case No. C95-5025RJB/JKA

REPORT AND
RECOMMENDATION
Re: Plaintiff's Motion to Terminate
All Provisions of Consent Decree
Other Than Those Relating to
Health Care (Doc#251)

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16 This action was commenced by plaintiff's in January of 1995 (Doc.#1). Plaintiffs
17 sought relief pursuant to 42 U.S.C. §1983 relating to alleged constitutional violations of
18 conditions affecting inmates housed at the Pierce County Jail. Pursuant to 28 U.S.C. § 636 the
19 matter was referred to U.S. Magistrate Judge J. Kelley Arnold. (Doc.#2).

20 This matter comes before the court on Defendant's Motion to Terminate all Provisions of
21 Consent Decree Other Than Those Relating to Health Care (Doc.#251). The Motion is noted for
22 September 25, 2009.

23 The undersigned has considered Plaintiffs' Response (Doc.#257), Defendants' Reply
24 (Doc.#260) and Plaintiffs' surreply with a Motion to Strike (Doc.#263), as well as all affidavits,
25 declarations, and attachments to these pleadings. The undersigned having additionally considered
26 all files and records herein, issues the following Report and Recommendation.

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1 **REPORT**

2 Plaintiffs' sought and received class certification approved by the Honorable Franklin D.
3 Burgess May 12, 1995 (Doc.#27). On March 28, 1996, Judge Burgess approved and entered a
4 Stipulated Order and Final Judgment in the nature of a Consent Decree (Doc.#89).

5 Aside from this motion, the following matters are pending:

6 1. A site visit by Dr. Joe Goldenson scheduled for September 30, October 1, and
7 October 2, 2009. Customarily, Dr. Goldenson prepares a draft report which is circulated to the
8 parties for comment. A final report is then prepared and filed with the court. This report may
9 trigger further pleadings on the cross motions regarding nursing staff referred to in the next
10 succeeding paragraph.

11 2. Plaintiffs' motion for the court to order increased nursing staff, and Defendants' cross
12 motion to terminate the Consent Decree as to any issue regarding nursing staff. Recognizing the
13 imminent site visit by Dr. Goldenson and the anticipated time it will take to prepare a draft report,
14 circulate the same for comment, and prepare a final report, this motion has been renoted for
15 December 15, 2009.

16 3. A request for a Joint Status Report due October 2, 2009, issued by the Honorable
17 Robert J. Bryan, which requests among other things a statement of remaining issues, a statement
18 regarding possible ADR, and the possible implications of 18 U.S.C. §3626 regarding appropriate
19 remedies with respect to prison conditions.

20 Specifically, Defendants now seek an order from the court terminating the Consent Decree
21 as to all provisions addressing prospective relief other than those relating to "Medical, Dental, and
22 Mental Health Care." (Doc #251).

23 Plaintiffs respond alleging and acknowledging the following:

24 1. that the issue of Outdoor Exercise has not been resolved,
25 2. no objection to terminating the following Consent Decree provisions: (a) Standards For
26 Any New Permanent Jail Facility; (b) Religious Access; (c) Legal Access; (d) Charges for Medical
27 Care; (e) Allegations of Staff Misconduct; (f) Bedding and Clothing; and (g) Air Quality, Heating,
28 and Cooling. Plaintiffs assert, however that these issues cannot be terminated without notice to
the class pursuant to F.R.C.P. 23(e) (Doc.#257).

Defendants reply asserting as follows:

- 1 1. that no issue remains regarding Outdoor Exercise; and
2 2. that F.R.C.P. 23 does not require notice to the class to terminate the Consent Decree
3 as to undisputed issues and/or those terminated by the court.

4 Plaintiffs' surreply with a Motion to Strike certain allegations and statements by defense
5 counsel's reply and affidavit (Docs #260/261) concerning the "outdoor exercise" issue.

6 **RECOMMENDATION**

7 The Undersigned will address the recommendation in the order of the issues raised – all
8 issues other than health care, outdoor exercise, and plaintiffs' motion to strike.

9 1. Pursuant to F.R.C.P. 23 the class received notice of the Consent Decree before
10 approval. The decree contemplated compliance being resolved by the court with the assistance of
11 a court-appointed monitor. That process has been underway for in excess of 13 years. F.R.C.P.
12 23(e) does not contemplate notice to the class of the court's adjudication of a matter. Its purpose
13 is to protect class members in the instance of a "Settlement, Voluntary Dismissal, or
14 Compromise." The court should declare the issues of (a) Standards For Any New Permanent Jail
15 Facility; (b) Religious Access; (c) Legal Access; (d) Charges for Medical Care; (e) Allegations of
16 Staff Misconduct; (f) Bedding and Clothing; and (g) Air Quality, Heating, and Cooling resolved
17 for purposes of this litigation.

18 2. The issue of "Outdoor Exercise" appears to have been resolved by way of what
19 appears to be an "updated" but undated Memorandum of Understanding (MOU) attached as
20 Exhibit C.¹ The MOU clearly addresses the issues submitted to the county by plaintiffs. It is clear
21 to the undersigned that the parties have resolved the issue of Outdoor Exercise. Plaintiffs'
22 concern that the MOU has not been fully implemented does not negate the fact of resolution.
23 Accordingly, the issue of Outdoor Exercise should be considered resolved.

24 3. Plaintiffs' Motion to Strike portions of defense counsel's affidavit and reply should be
25 stricken or denied as not relevant to the basis of the court's recommendation.

26 4. Adoption of Recommendations 1, 2, and 3. as above set forth, would be tantamount to
27 granting Defendants' Motion to Terminate All Provisions of Consent Decree Other Than Those

28 ¹Although the Memorandum of Understanding does not appear to be dated, both plaintiff
and defense counsel state it was entered into July 1, 2009.

Relating to Health Care.

5. If the court adopts the recommendations above set forth, the undersigned recommends
that the parties be ordered to mediate the Health Care Issues before the court scheduled trial date.

Although there have been past attempts at mediation, the undersigned believes that with the knowledge that resolution of the health care issues would bring finality and closure to this action, there may be additional incentive for mediation to be successful.

6. Nothing in this recommendation should be construed to delay the parties responsibility to complete the Joint Status Report due October 2, 2009.

Dated this 28th day of September 2009.

/s/ J. Kelley Arnold
J. Kelley Arnold